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**ORIGINAL**

February 28, 2002

**RECEIVED**

**FEB 28 2002**

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**VIA HAND DELIVERY**

Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
The Portals  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

**Re: Written Ex Parte Notification  
GN Docket No. 00-185 Inquiry Concerning High-Speed Access  
to the Internet Over Cable and Other Facilities**

Dear Mr. Caton:

Please be advised that on Thursday, February 28, 2002, Insight Communications ("Insight") submitted the attached letter to W. Kenneth Ferree, Chief of the Cable Services Bureau (with copies to Sarah Whitesell, Associate Chief of the Cable Services Bureau, and Royce Sherlock, Deputy Chief of the Policy and Rules Division of the Cable Services Bureau). The purpose of the letter was to urge that, in the event cable modem service is classified as an "information service," the Commission indicate that cable operators will not be subject to retroactive refund liability for having collected franchise fees on cable modem service revenues during the pendency of this proceeding. Included with the letter to Mr. Ferree is a copy of a 1997 ruling issued by the Cable Services Bureau that Insight believes is pertinent to this issue.

Pursuant to Section 1.1206(b) of the Commission's rules, an original and one copy of this letter and enclosures are being submitted to the Secretary's office for inclusion in the record of the above-referenced proceeding and a copy is being provided to Mr. Ferree, Ms. Whitesell, and

JILL KLEPPE McCLELLAND  
REGINA FAMIGLIETTI PACE  
CRAIG A. GILLEY  
MARK D. PIHLSTROM  
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THOMAS E. KNIGHT  
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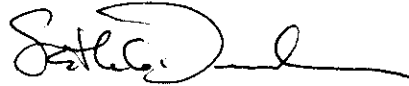
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Att. of Copies rec'd. *OH*  
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Mr. William F. Caton  
February 28, 2002  
Page 2

Ms. Sherlock. If there are any questions regarding this matter, please communicate directly with the undersigned.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Seth A. Davidson', with a long horizontal flourish extending to the right.

Seth A. Davidson

cc: W. Kenneth Ferree  
Sarah Whitesell  
Royce Sherlock

143585

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**VIA HAND DELIVERY**

Mr. W. Kenneth Ferree  
Chief, Cable Services Bureau  
Federal Communications Commission  
The Portals  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

**Re: GN Docket No. 00-185 – Inquiry Concerning High-Speed Access  
to the Internet Over Cable and Other Facilities**

Dear Mr. Ferree:

One of the issues that has arisen in the above-referenced proceeding is the possibility that a determination by the Commission that cable modem service is an “information service” could trigger attempts to impose retroactive refund liability on cable operators who collected franchise fees on cable modem service revenues during the proceeding’s pendency. Insight Communications submits that the Commission should indicate that the imposition such retroactive refund liability would be inappropriate since cable operators who collected such fees and remitted them to local franchising authorities did so on the basis of a good faith belief that cable modem service should be classified as a “cable service.”

In addition, because of concerns that plaintiff’s attorneys might try to circumvent a Commission determination on the retroactive liability issue by filing state court class action lawsuits, Insight submits that the Commission also should confirm that the status of franchise fees collected on cable modem service revenues is a rate regulation matter and that, in accordance with Section 623(a)(1) of the Communications Act, the Commission’s rules and procedures provide the exclusive means for resolving such matters. For your convenience, we are enclosing with this letter a copy of a Cable Services Bureau ruling that we believe is directly

Mr. W. Kenneth Ferree

February 28, 2002

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pertinent to this point. (A copy of this ruling also has been provided to the Offices of Chairman Powell and Commissioners Martin, Abernathy, and Copps in a separate *ex parte* presentation).

If there are any questions regarding this matter, please communicate directly with the undersigned.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Seth A. Davidson", with a long horizontal flourish extending to the right.

Seth A. Davidson

cc: Sarah Whitesell  
Royce Sherlock

143587

Federal Communications Commission  
Washington, D.C. 20554

September 17, 1997

DA 97-1995  
CSB-ILR 97-8

Released: September 18, 1997

Comcast Cable Communications, Inc.  
c/o Thomas R. Nathan, Esq.  
Vice President/General Counsel  
1500 Market Street  
Philadelphia, Pennsylvania 19102-2148

Dear Mr. Nathan:

This is in response to your letter of September 9, 1996. According to your letter, a number of class-action lawsuits have been filed against cable systems owned by Comcast in the state courts of Florida and Alabama, alleging that the company has overcharged subscribers by miscalculating the amount of franchise fees that may be passed through to each subscriber.<sup>1</sup> You seek guidance on whether the issues in these suits are matters of cable television rate regulation subject to the statutory and regulatory rules and procedures for the resolution of such issues. Although copies of your letter were served on counsel of record in the State cases, the Commission has received no reply to your letter.

You contend that the lawsuits allege that the company's rates, which include the franchise fee as an itemized pass-through, violate state common law and seek remedies for the alleged violations apart from whether the charges violate Title VI of the Communications Act or any pertinent FCC rule. You state that the lawsuits do not contend that the alleged overcharges violate Title VI of the Communications Act or any pertinent FCC rule. What the lawsuits allege, according to your letter, is that the company's rates, which include the franchise fee as an itemized pass-through, violate state common law. You ask for confirmation that under the Communications Act and the Commission's rules a party wishing to challenge the propriety of a pass-through of a franchise fee in subscribers' rates may do so only pursuant to the Commission's rate regulation rules.

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<sup>1</sup>*Olensky v. Comcast Cablevision of Mobile, Inc., et al.* Civil Action No. CV96-000549, Mobile County Cir. Court; *Pradat, et al. v. Comcast Cablevision of Tuscaloosa, Inc.* Civil Action No. CV96-520, Tuscaloosa County Cir. Court; *Platt, et al. v. Comcast Cablevision of Dothan, Inc.* Civil Action No. CV96-310, Houston County Cir. Court; *Delpech, et al. v. Comcast Cablevision of West Florida, Inc.* Case No. 96-2651, 12th Jud. Cir. Court, Sarasota Co.; *Houser, et al. v. Comcast Cablevision of Tallahassee, Inc.* Case No. 96-2538 2nd Jud. Cir. Court, Leon Co.; *Fletcher, et al. v. Comcast Cablevision of Panama City, Inc.* Case No. 96-1254, 14th Jud. Cir. Ct., Bay Co., Fla.

Section 623(a)(1) of the Communications Act of 1934, as amended, 47 U.S.C. § 543, states that

[n]o Federal agency or State may regulate the rates for the provision of cable service except to the extent provided under this section and section 612. Any franchising authority may regulate the rates for the provision of cable service, or any other communications service provided over a cable system to cable subscribers, but only to the extent provided under this section.

Section 623 sets forth a comprehensive framework for the regulation of rates for basic cable service and for cable programming service ("CPS") tiers, pursuant to regulations adopted by the Commission. Basic rates of systems not subject to effective competition are subject to regulation by franchising authorities or, in certain circumstances in which the franchising authority is unwilling or unable to implement such regulation, by the Commission. CPS rates of systems not subject to effective competition are subject to regulation by the Commission if a franchising authority receives complaints from subscribers regarding such rates and, in turn, files a complaint with the Commission.<sup>2</sup> Basic and CPS rates of systems subject to effective competition are not subject to regulation, and rates for services provided on a per-channel or per-program basis are not subject to regulation regardless whether a system is subject to effective competition.

Cable television system franchise fees are established in municipal franchise agreements or through other local ordinances or statutes. The level of such fees is limited by Section 622 of the Communications Act.

The Commission's rules, which establish formulas and procedures for determining a system's maximum permissible rates for basic service and CPS tiers, specifically permit systems to pass through to subscribers the full amount of any franchise fees paid to franchising authorities. The Commission has made clear that rates for basic and CPS tiers may include pass-throughs of all franchise fees paid, including fees assessed on revenues obtained from sources other than the sale of basic and CPS service. The following question and answer appear in a *Public Notice*, Cable Television Rate Regulation Questions and Answers released, May 13, 1993:

Question: May any portion of franchise fees attributable to unregulated services be passed through to customers?

Answer: The entire amount of franchise fees may be passed through to subscribers.<sup>3</sup>

Thus, the Commission's regulations and policies permit a cable television operator to pass through to subscribers all franchise fees which are attributable to both regulated and unregulated services.

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<sup>2</sup>Prior to enactment of the Telecommunications Act of 1996, a subscriber could file a complaint directly with the Commission. Today such complaints may be filed only by franchising authorities.

<sup>3</sup>Page 10, Question 31.

As is evident from the foregoing, the Commission regards questions relating to the propriety of such franchise fee pass-throughs as rate regulation matters. Rate regulation issues, as is reflected in Section 623(a)(1) of the Communications Act, are to be reviewed and adjudicated by franchising authorities and/or the Commission pursuant to the Commission's rate regulation standards and procedures. Under those procedures, systems subject to regulation must provide franchising authorities and the Commission with documentation that demonstrates that any pass-throughs of franchise fees have been properly calculated. Upon receipt of such documentation,

[t]he franchising authority or the Commission, as appropriate, may then review the pass-through of increases in franchise fees and may order a prospective rate reduction and refunds in accordance with our rules in the event the operator has increased its basic service rates by more than the increase in franchise fees properly allocable to the basic tier . . . .

Rate justifications relating to franchise fee-related increases in CPS tier rates will be reviewed by the Commission according to existing rules for Commission review of basic service tier rates.<sup>4</sup>

As the Commission has stated,

the Cable Act of 1992 makes clear that regulation of the 'rates for the provision of cable service' is governed exclusively by the federal statute and Commission regulations. It therefore 'specifically preempts' state and local regulation which is inconsistent with the federal rules . . . where state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress, the state law is preempted . . . .<sup>5</sup>

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<sup>4</sup>*Fourth Order on Reconsideration*, 9 FCC Rod 5795, 5796 (1994).

<sup>5</sup>Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, *Stash Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking*, 10 FCC Rod 1226, 1265 (1994).

The Commission's rules and procedures, therefore, provide the exclusive means for determining whether franchise fees have been properly "passed through" and whether the resulting rates are permissible. State statutes, regulations and common law that have the effect of preventing cable systems from passing through and recovering franchise fees in their entirety in regulated basic and CPS rates that conflict with the rules and procedures adopted by the Commission are inconsistent with the framework set forth in Section 623 and have been preempted. *See Time Warner Cable v. Doyle*, 66 F.3d 867 (7th Cir. 1995), *cert. denied*, 116 S.Ct. 974 (1996).

Sincerely,

Meredith J. Jones  
Chief, Cable Services Bureau